

1804819 (Migration) [2018] AATA 4487 (31 August 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1804819

MEMBER: Adrienne Millbank

DATE: 31 August 2018

PLACE OF DECISION: Brisbane

DECISION: The Tribunal affirms the decisions not to grant the visa applicants Child (Migrant) (Class AH) visas.

Statement made on 31 August 2018 at 2:06pm

CATCHWORDS

MIGRATION – Child (Migrant) (Class AH) visa – Subclass 117 (Orphan Relative) – bogus identity documents – authenticity of Tazkira – documents acquired in good faith – compassionate or compelling circumstances – stress and depression – separation from family – financial strain – applicant’s ability to support themselves – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65

Migration Regulations 1994 (Cth), r 1.03, Schedule 2, cl 117.223, Schedule 4, Public Interest Criterion 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 29 January 2018 to refuse to grant the visa applicants Child (Migrant) (Class AH) visas under s.65 of the *Migration Act 1958* (the Act).
2. The three visa applicants are Afghan nationals who have lived in Quetta in Pakistan since 2000. At the time of decision they are aged [age], [age] and [age]. They claim they are siblings of the review applicant, who arrived as a boat person, via [Country 1], in 2010, and was granted permanent residence in 2012. The third-named applicant is at the time of decision in [Country 1], where, according to the review applicant, he has been recognised by the United Nations High Commissioner for Refugees (UNHCR) as a refugee.
3. The visa applicants applied for the visas on 21 November 2012. At that time, Class AH contained three subclasses: Subclass 101 (Child), Subclass 102 (Adoption) and Subclass 117 (Orphan Relative). In this case, claims have been made in respect of the Subclass 117 visa.
4. The criteria for a Subclass 117 visa are set out in Part 117 of Schedule 2 to the Migration Regulations 1994 (the Regulations). Relevantly to this case, they include cl.117.223, which requires an applicant to meet Public Interest Criteria (PIC), including PIC 4020.
5. The Delegate refused to grant the visas because the applicants did not meet cl.117.223 of Schedule 2 to the Regulations. They were found to have provided bogus identity documents, and therefore not to meet PIC 4020(1). The third-named applicant, who is [age] years old and living in [Country 1] at the time of decision, was also found not to meet PIC 4020(2A).
6. The review applicant appeared before the Tribunal on 23 August 2018 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages.
7. The review applicant was represented in relation to the review by his registered migration agent, who attended the hearing.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets PIC 4020 as required by cl.117.223 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or

refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
14. The record of decision included the following information, drawn from country information sources, regarding the Tazkira, the Afghani identity document:

A Tazkira is an official identity certificate issued by Afghanistan's Population Registration Directorate (PRD) to Afghan nationals. The PRD is responsible for registering details relating to birth and deaths and is the only authority to issue documents such as birth certificates and other security release forms for Afghan citizens.

A Tazkira serves as an Afghan citizen's primary form of identification and means of accessing legal entitlements. Every Afghan is required to have an identity document (Tazkira), and it is necessary to have one in order to (amongst other things) apply for jobs, admission to school or university, obtain a passport, register marriages with the Supreme Court of Afghanistan, permission to run a business or to rent, and to buy or sell a property.

Tazkiras are issued by the Afghan PRD in Kabul or by PRD offices at provinces in Afghanistan. Adults must apply for Tazkiras in person. Tazkiras are not issued, and

have not been issued, by the Afghan diplomatic missions in Pakistan. The PRD is required to check family records (family tree) from previous registrations either in Kabul or at the home province prior to the issue of a Tazkira to a new family member.

15. Due to concerns regarding the authenticity of the Tazkiras presented with the applications, the Department sent by them for verification to the relevant issuing authority in Afghanistan. On 8 June 2017, the Department was advised that the Tazkiras had not been issued by the PRD.
16. In the applicants' response to natural justice letters, on 29 September 2017, they claimed they obtained the Tazkiras in good faith, from the Afghan Consulate in Quetta. They claimed they had not realised the documents submitted to the Department were non-genuine, and submitted that a 'rogue officer' in the consulate in Quetta may have been responsible for issuing the bogus documents.
17. The Delegate considered the claim that the provision of non-genuine documents was unintended. The Delegate noted that it has never been the case that an Afghan consulate in Pakistan could issue a valid Tazkira. The Delegate further noted that the requirement in PIC 4020(1) not to provide a bogus document or false or misleading information applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
18. At hearing the review applicant did not dispute that the applicants had provided identity documents, Tazkiras, that were determined by the issuing authority to be bogus. He described how his family fled their village in Oruzgan Province, in 2000, following the arrival of the Taliban. He advised that the family has lived in Quetta illegally; that most of his siblings remained living there after their parents died. He claimed that the applicants acquired the bogus Tazkiras from the Afghan consulate in Quetta in good faith.
19. The Tribunal has considered the review applicant's claim that the applicants acted in good faith when they acquired the bogus Tazkiras. The Tribunal found the review applicant forthright and articulate at hearing, and accepts his testimony regarding the obtaining of the bogus Tazkiras. The Tribunal notes however that the requirement not to provide a bogus document applies whether or not the document is provided by an applicant knowingly or unwittingly. The review applicant's claim that the applicants obtained the documents in good faith does not impact on whether the applicants have given or caused to be given, bogus documents.
20. The review applicant provided copies of passports and new Tazkiras for the first and second-named applicants, which he claimed they obtained in person from the PRD in Kabul, in 2017. He advised that the third-named applicant was unable to obtain a new Tazkira because he is living in [Country 1]. The Tribunal notes that there is no provision in the legislation, or in Departmental policy advice, for an applicant to 'correct' the giving of a bogus document, by providing a genuine document at a later date. PIC 4020 states:
 - (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or is misleading in a material particular in relation to:
 - (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
 - (2) The Minister is satisfied that during the period:

- (a) starting 3 years before the application was made; and
- (b) ending when the Minister makes a decision to grant or refuse the application; the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2A) The applicant satisfies the Minister as to the applicant's identity.

21. The Tribunal finds that the applicants have given to the Minister bogus documents, i.e. documents that are counterfeit, namely fraudulent identity documents, Tazkiras. Therefore, the applicants do not meet PIC 4020(1).
22. The third-named applicant has not provided a new Tazkira, and, based on the information before to the Tribunal, he has not provided sufficient alternative documents to satisfy the Minister as to his identity. No further information or evidence was provided to the Tribunal regarding the third-named applicant's identity. The third-named applicant has not satisfied the Tribunal as to his identity, and the Tribunal therefore finds that he does not meet PIC 4020(2A).

Should the requirements of PIC 4020(1) or (2) be waived?

23. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
24. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
25. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
26. The review applicant argued, in terms of compassionate or compelling circumstances, that it is 'hard on him mentally' to live in Australia, 'a foreign country', without his family. He confirmed at hearing that he has no relatives in Australia. He advised that besides his siblings, he has a wife and baby daughter living in Quetta, who are awaiting the outcome of a Partner visa application. He advised that he visits his wife, daughter and siblings annually, but this places emotional as well as financial strain on him. He advised that it is difficult for him to say farewell at the end of his visits.
27. The review applicant's representative, in a written submission signed on 29 September 2017, argued:

As an Australian permanent resident, (the review applicant) has been deprived of these basic privileges of forming or being with his own family. He even has had this Australia citizenship process delayed where the High Court of Australia ruled against DIBP. (The review applicant) cannot return to Afghanistan and live there for a prolonged period of time due to the security threats there to the Hazara community. The only viable option is for them to be together in Australia. He needs to remain in Australia so that he can continue to hold his job and provide for his siblings' financial

needs. (The review applicant) suffers from stress and depression due to the prolonged separation from his family, siblings included, and the letter from his GP verifies this. His degrading mental state can affect his working ability and his ability to support himself in Australia. He is having to continually send money to his siblings for their wellbeing and this is a big financial strain on him and limits him to properly settle in Australia. Should his siblings be here in Australia with him, he would be better able to handle the situation as they are close to him and he will not have to worry about their security situation in Afghanistan which is getting worse every day for members of his ethnic and religious community.

28. In a statutory declaration signed on 29 September 2017 the review applicant declared:

The prolonged stress about my siblings has disrupted my settlement process in Australia. I feel like I can't move on and do bigger and better things in Australia. I have my own business which is stressful on its own and to have this added stress is not needed in my life.

I feel like I lost my memory and I'm not the person who I was before. I promised my wife, sister and my brothers that I never leave them alone, but what happens now, I can't see them for at least a year. I can't help them when they need me. I can't be there when my daughter was born. I can't make them happy. I can't take them out for shopping or lunch. I can't be there to help my pregnant wife. I can't be there to send them to school.

29. The Tribunal notes that at the time of decision the applicants are [age], [age] and [age] years old, and not in need of sending to school. The Tribunal further notes that the review applicant's GP wrote in his letter 'To whom it may concern', of 29 September 2017, only that the review applicant 'claims he is depressed because he misses his wife and daughter aged [age]. They live in Pakistan, and wants to have family reunion with his sister and daughter'. The Tribunal notes that the review applicant's wife has lodged a Partner visa application for herself and their daughter.
30. No claim was made or evidence provided that the review applicant has been diagnosed with a mental illness. The Tribunal accepts that the review applicant has suffered stress and depression through separation from his family, but notes, following the review applicant's own advice at hearing, that the stress and depression he has suffered has not been such as to affect his ability to work and support himself. For these reasons, the Tribunal does not find the circumstance of the review applicant's stress and depression to be compassionate or compelling such as to justify the granting of the visas.
31. The Tribunal accepts, on the evidence provided, that the review applicant has sent money to his siblings in Afghanistan and that this has put him under financial strain, but does not find this a compassionate or compelling circumstance. The review applicant's siblings are adults. No information or evidence was provided that they are incapable of supporting themselves, at least partly. The review applicant claimed at hearing that both his siblings in Afghanistan are still students, but acknowledged that his sister has also worked as [an occupation]. No evidence was provided that the review applicant has financially supported his [age]-year old brother in [Country 1], and the Tribunal does not accept his claim that this brother is financially dependent on him.
32. At hearing the review applicant presented as articulate and forthcoming, and the Tribunal accepts that he is sincere in his testimony that he has worked hard to establish himself, and feels an obligation to bring his siblings to join him in Australia, a safe country where he feels they could have a better future. While finding the review applicant forthcoming and articulate, the Tribunal notes that he has not been entirely truthful in his dealings with the Department. In submissions provided on 29 September 2017 he advised that the first and fifth-named applicants had gone 'missing'. (At the time of application there were five applicants.) At

hearing, the review applicant acknowledged that the fifth-named applicant was the brother of his wife, and not a dependent sibling of his, as claimed in the application.

33. The Tribunal acknowledges that the review applicant wants the applicants to join him in Brisbane to alleviate his loneliness as well as the burden and obligation he feels to support them in Pakistan. While sympathetic to the review applicant's circumstances, the Tribunal notes, again, that the applicants at the time of decision are adults. The Tribunal notes that the review applicant is waiting for the outcome of a Partner visa application for his wife and daughter to join him in Australia. The Tribunal finds the review applicant's desire to assist his siblings to migrate to Australia is understandable, but does not find his circumstances of burdened loneliness compassionate or compelling such as to justify the granting of the visas.
34. Therefore, the applicants do not meet PIC 4020(1) and cl.117.223. The criteria for the grant of Subclass 117 visas are not met. There have been no claims advanced in respect of the other visa subclasses in Class AH.

DECISION

35. The Tribunal affirms the decisions not to grant the visa applicants Child (Migrant) (Class AH) visas.

Adrienne Millbank
Member